No. 80-617

Supreme Court, U. S.
FILED
JAN 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELAINE JEAN STEMPLE, ET AL.,

Petitioners,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS, THE STATE BOARD EDUCATION OF MARYLAND AND THE BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
Attorney General of Maryland
GEORGE S. NILSON,
Deputy Attorney General
Counsel of Record
ELLEN M. HELLER,
ANNE C. SIROTA,
Assistant Attorneys General
One South Calvert Building
Baltimore, Maryland 21202
(301) 659-4000
Attorneys for State Board of Education of Maryland

PAUL M. NUSSBAUM,
Counsel of Record
RICHARD C. DANIELS,
3723 34th Street
Mt. Rainier, Md. 20822
Attorneys for Board of Education of Prince George's County

The Daily Record Co., Baltimore, MD 21202

No. 80-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELAINE JEAN STEMPLE, ET AL.,

Petitioners,

V.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT, THE STATE BOARD OF EDUCATION OF MARYLAND AND THE BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Under § 615(e)(3) of the Education for All Handicapped Children Act of 1975, does the duty to keep a child in his or her then current educational placement during the pendency of any review proceedings arise as soon as school authorities have made a decision as to the identification, evaluation, and placement of a handicapped child?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
PRELIMINARY COMMENT	1
STATEMENT OF THE CASE	1
REASONS OF DENYING CERTIORARI	6
I. The Petition Presents A Very Limited Issue For Review	7
II. Petitioners Have Failed to Cite Any Case Inconsistent With The Fourth Circuit's Decision in this Case	8
III. The Fourth Circuit's Interpretation of § 1415(e) (3) Gives Effect To Its Plain Meaning And Promotes The Purposes Of The EAHCA	14
CONCLUSION	19

TABLE OF CITATIONS

Cases

Capello v. D.C. Board of Education, 3 EHLR 551:500 (D.D.C. Jan. 23, 1980), 3 EHLR 551:190 (D.D.C. May 9, 1979) *appeal dismissed,* No. 80-1217 (D.C. Cir. June 11, 1980)	8, 11
Frankel v. Commissioner of Education, 480 F. Supp. 1151 (S.D.N.Y. 1979)	8, 11
Howard S. v. Friendship Independent School District, 454 F. Supp. 634 (S.D. Tex. 1978)	8, 10
Monahan v. State of Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), *appeal docketed,* No. 80-1436 (8th Cir. June 4, 1980)	8, 9, 15
Roschen v. Ward, 279 U.S. 332 (1929)	15

PREVIOUS PAGE WAS BLANK

PAGE

Stemple v. Board of Education of Prince George's County, et al., 464 F. Supp. 258 (D. Md. 1979) *passim*

Stemple v. Board of Education of Prince George's County, et al., 623 F.2d 893 (4th Cir. 1980) *passim*

Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978) 10

Statutes

Education For All Handicapped Children Act of 1975:

20 U.S.C. § 1414(a) (5) 17

20 U.S.C. § 1415(e) (3), § 615(e) (3) ..... *passim*

20 U.S.C. § 1415(e) (4) 3

20 U.S.C. § 1415(b), (d), (e) 14

Rehabilitation Act of 1973, 20 U.S.C. § 794 3

Md. Ann. Code, Art. 77, § 100A 3

Md. Ann. Code, Art. 77, § 106D (g) 2

Federal Regulations

45 C.F.R. § 121a *et seq* 17

45 C.F.R. § 121a.343(d) 17

45 C.F.R. § 121a.509 14

45 C.F.R. § 121a.552 17

Miscellaneous

Maryland State Board of Education By law 13.04.01.06.D.5 17-18

PRELIMINARY COMMENT

Respondents, the State Board of Education of Maryland (the "State Board") and the Board of Education of Prince George's County (the "County Board"), respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this case. The Fourth Circuit opinion is reported as *Stemple v. Board of Education of Prince George's County, et al.*, 623 F.2d 893 (4th Cir. 1980), as amended by Order of August 18, 1980, No. 79-1208. The District Court opinion is reported at 464 F. Supp. 258 (D. Md. 1979).[1]

STATEMENT OF THE CASE

1. *Introduction*

Elaine Stemple is a multi-handicapped child with a long history of physical and emotional disabilities. She was enrolled in various special education programs in the Prince George's County public school system from 1969 until May, 1976. During that time her parents voiced no formal objection to her educational program. App. A at 2a; App. C at 10a.[2]

Until January, 1976, Elaine's educational placements in the public schools were in small, special education group settings. At that time, school officials made a decision that her special education program should include placement in a normal classroom setting for part of the school day. The purpose of the change was to assist her in developing socialization skills with her peers. *Id.* Petitioners do not

[1] The Court of Appeals' decisions are reprinted as Appendix A and Appendix B to the Petition for Writ of Certiorari (the "Petition") and the District Court opinion is reprinted as Appendix C to the Petition.

[2] All references to appendices are to appendices to the Petition, unless otherwise stated.

allege that school officials violated procedures mandated by any State or federal statute when they made the placement determination in January, 1976.

In May, 1976, without initiating the proceedings provided by state law to parents who wish to change a child's placement,[3] Elaine's parents withdrew her from the public school and placed her in the Leary School, a private institution for handicapped children. App. A at 2a-3a; App. C at 10a. This was a unilateral decision by the parents. App. A at 6a. Public school officials did not suggest, recommend or require Elaine's removal from her public school placement, or suggest an alternative placement. Elaine remained at the Leary School until September, 1978, at which time she returned to the Prince George's County school system in a program agreed upon by her parents and school authorities.[4] App. A at 2a-3a; App. C at 10a.

2. *Administrative Proceedings*

On June 18, 1976, the Stemples filed a request for reimbursement of the tuition for the Leary School for the upcoming 1976-77 school year, pursuant to Md. Ann. Code Art. 77, § 106D(g)[5] which states in pertinent part that "[t]he cost of [a] nonpublic educational program shall be paid by the State and the County in which the child is domiciled" when a child is "in need of special educational services that are not provided in a public . . . program." After this request was denied by the Prince George's County public school in August, 1976, the Stemples took

[3] These proceedings will be described in the Respondents' argument against the grant of certiorari.

[4] As will be stated in giving the chronology of administrative and court proceedings, Elaine's return to public school narrowed the case to a claim for monetary relief.

[5] Because this case involves the 1976-77 school year, unless otherwise indicated, all statutory references to State law are to statutes in effect at that time.

no action until May 27, 1977, at which time they requested a hearing to determine the suitability of available public special education programs to meet Elaine's learning needs. App. C at 10a.

After a County hearing held on August 19, 1977, the independent hearing officer found that the County could have provided Elaine with an appropriate education within its public schools for the 1976-77 school year, and that there was not sufficient evidence to justify the child's placement in a private school. App. A at 3a; App. C at 10a; App. E at 18a.

Petitioners appealed this decision to the Maryland State Department of Education Hearing Review Board ("State Hearing Board") pursuant to Md. Ann. Code, Art. 77, § 100A. The state level hearing occurred on February 17, 1978, and a decision agreeing with the lower tribunal's decision was rendered on February 28, 1978. App. A at 3a; App. C at 10a; App. D at 15a.

The State Hearing Board specifically stated that its findings were "directed to the school year 1976-77 only" and that it was "without jurisdiction to consider funding for May and June, 1976 and the 1977-78 school year." As part of the decision, the parents were advised that they had a right to initiate an appropriate appeal for the latter time periods. App. A at 3a; App. D at 15a.

3. *Proceedings in the District Court*

On March 31, 1978, Petitioners brought this action against Respondents in the United States District Court for the District of Maryland. Petitioners claimed jurisdiction under § 615, the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415(e)(4), and § 504 of the Rehabilitation Act of 1973, 20 U.S.C. § 794.[4] By their

[4] Section 615 of the EAHCA was enacted on November 29, 1975, but did not become effective until October 1, 1977. When

complaint, Petitioners sought judicial review of the State Hearing Board decision that the County Board could have provided Elaine an appropriate public school program for the 1976-77 school year.

The Stemples raised three issues before the District Court:

(1) That the decision of the State Hearing Board was not based on a preponderance of the evidence;

(2) That the parents of Elaine Stemple unfairly bore the burden of persuasion during the administrative proceedings; and

(3) That the State Department of Education introduced a report during the hearing which Petitioners had not reviewed.[7]

The District Court entered a final judgment dismissing the action on January 22, 1979, holding that the Eleventh Amendment barred any award of monetary relief. As stated above, Elaine had already returned to a County public school in a program that met with the approval of her parents and the school authorities when the case was presented to the District Court. Therefore, injunctive relief was not an issue. In dismissing the case, the District Court was acting only on the claim for monetary relief; namely, tuition reimbursement for the 1976-77 school year.[8]

---

the law became effective, all operative events challenged by Petitioners had already occurred and their appeal was pending before the State Hearing Board.

The Education for All Handicapped Children Act will hereinafter be referred to as the "EAHCA" or the "Act." The Act, in its entirety, appears as App. F.

[7] Petitioners did not allege in the District Court that they were deprived of an opportunity for a hearing, or that the Respondents breached any statutory requirements before the parents acted unilaterally to remove Elaine from public school in May, 1976.

[8] Petitioners conceded in oral argument before the court that money was the ultimate issue. App. C at 13a.

4. *Proceedings in the Court of Appeals*

After a final appeal was considered on full briefs and argument, the Court of Appeals for the Fourth Circuit affirmed the dismissal on May 27, 1980. Like the District Court, it saw the issue of tuition reimbursement, either for the 1976-77 school year or the entire period Elaine attended the private school, as the sole issue for decision. App. A at 4a. Like the District Court, the Fourth Circuit found that the County had afforded Elaine special education training from the time of her entry into the public school in 1969, and that the Stemples voiced no formal objection to her placement before removing her from public school in May, 1976. App. A at 2a; App. B at 8a.

The Fourth Circuit did not, however, reach any of the issues decided adversely to Petitioners by the District Court. Affirming the lower court, the appellate court held that the Stemples could not obtain reimbursement because their unilateral placement of the child in the Leary School violated the requirement of § 615(e)(3) of the EAHCA which:

> creates a duty on the part of parents who avail themselves of the hearing and review provisions of § 615 to keep their child in his current educational assignment while the hearing and review provisions are pending, absent agreement between them and the education authorities that some different arrangement be made. App. A at 5a.

While the Court noted that the duty would not be "totally" enforceable by the State,[9] it held that the Stemples, who violated this duty, could not obtain tuition reimbursement. App. A at 5a.

[9] In stating that the duty is not totally enforceable, the Court recognized the obvious fact that the duty does not actually prevent parents from moving their child from public to private school.

On August 18, 1980, a timely petition for rehearing was denied.[10] Petitioners now request this Court to review the Fourth Circuit's decision that the Stemples cannot obtain reimbursement for the tuition costs of the Leary School during the 1976-77 school year.

REASONS FOR DENYING CERTIORARI

In asking that this Court grant certiorari, Petitioners make a bald assertion that the Fourth Circuit's decision will "effectively abrogate the substantive and procedural rights of a great number of handicapped children that Congress otherwise granted in the law in question." Petition at 15.

They contend that the Fourth Circuit's application of § 615(e)(3) is contrary to statutory interpretation by other district courts and policy letters of the Bureau of Education for the Handicapped ("BEH"), and contrary to the plain meaning and intention of the provision.

As the discussion below indicates, these contentions are wholly without merit. Although the outcome of the case is important to the Stemples, as they have so far been denied financial remuneration, the decision of the Court of Appeals addresses and determines, quite correctly, only a very narrow issue. Moreover, the Fourth Circuit's decision is consistent with other case law and gives effect to both the words and purposes of the statute.

---

[10] In the order denying rehearing, the Fourth Circuit modified its opinion in one respect. Setting forth the facts concerning Elaine's past special education placements, the court originally stated:

> From 1969 until May, 1976, she was afforded such training by the County in a manner satisfactory to her parents.

In the order, the court revised this as follows:

> From 1969 until January, 1976, she was afforded such training by the County and her parents voiced no formal objection in her placement. App. B at 8a.

The change did not affect the decision of the issue which Petitioners are asking this Court to review.

I.

THE PETITION PRESENTS A VERY LIMITED ISSUE FOR REVIEW.

The Fourth Circuit's decision in this case responds to a request for a limited type of relief, given a highly specific set of facts, and rests on narrow grounds. The court ruled only that when parents, like the Stemples, violate the duty set forth in § 615(e)(3) to keep a child in his then current placement during the pendency of review proceedings, they lose any right to recover the tuition costs thereby incurred.

Section 615(e)(3) states:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

The Court held that this provision creates a duty on the part of parents who avail themselves of the hearing and review provisions of the Act to keep the child in the current educational assignment, App. A at 5a, and Petitioners do not challenge this holding. They agree that parents who remove a child from his or her public school placement without the agreement of school authorities after invoking review procedures have removed a child during the pendency of proceedings and may not seek reimbursement for private school tuition expenses thereby incurred. Petition at 24-25.

Petitioners' sole contention is that § 615(e)(3) is inapplicable in this case because the Stemples removed Elaine to private school *before* they invoked the administrative and appeal provisions of the Act, and, therefore, they did

not remove her during the pendency of proceedings within the meaning of the Act. In ruling against Petitioners on this point, the Fourth Circuit stated:

> We reject this contention. It places too restricted a reading on § 615(e)(3). We do not think that the application of § 615(e)(3) depends upon the fine distinction between whether proceedings under § 615 are initiated before or after the duty to preserve the status quo is breached. The duty, it seems to us, arises as soon as school authorities make a decision as to identification, evaluation and placement of a handicapped child and continues until a decision not to contest it is reached or, if a contest ensues, until that contest is finally determined. App. A at 6a.

The only question which Petitioners present for review is the Fourth Circuit's holding as to the point in time at which the duty imposed by § 615(e)(3) arises.

II.

PETITIONERS HAVE FAILED TO CITE ANY CASE INCONSISTENT WITH THE FOURTH CIRCUIT'S DECISION IN THIS CASE.

Petitioners assert that the decision of the lower court is inconsistent with interpretations of § 615(e)(3) by four federal district courts, as well as administrative decisions by the Bureau of Education for the Handicapped ("BEH"). However, an examination of the cases shows that the cited decisions address totally different issues, and differ factually from the present case in crucial aspects. *See Monahan v. State of Nebraska,* 491 F. Supp. 1074 (D. Neb. 1980), *appeal docketed,* No. 80-1436 (8th Cir. June 4, 1980); *Capello v. D.C. Board of Education,* 3 EHLR 551:500 (D.D.C. Jan. 23, 1980), 3 EHLR 551:190 (D.D.C. May 9, 1979) appeal dismissed, No. 80-1217 (D.C. Cir. June 11, 1980); *Frankel v. Commissioner of Education,* 480 F. Supp. 1156 (S.D.N.Y. 1979); *Howard S. v. Friendship Independent School District,* 454 F. Supp. 634 (S.D. Tex. 1978). Thus, the conflict with the case law from other

jurisdictions which Petitioners contend is created by the Fourth Circuit decision does not exist.

Petitioners cite *Monahan v. State of Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), *appeal docketed*, No. 80-1436 (8th Cir. June 4, 1980), as having interpreted § 615(e)(3) in "precisely the manner that petitioner contends it should be and in stark contrast to the fourth circuit's construction." Petition at 35-36. This is misleading because it suggests that the court was construing § 615(e)(3) on the same issue as we have here; namely, whether parents can avoid § 615(e)(3) by removing the child from a placement which they wish to challenge before invoking the statutory procedures for challenging it.

In fact, in *Monahan*, the court was addressing a very different situation — one where there was no existing placement in which the child could remain during the proceedings. The procedure called for by § 615(e)(3) was inapplicable by the nature of the facts and could not supply the basis for the court's decision. Addressing the need to determine an interim placement, the court stated in dicta that a child's then current educational placement is normally determined as of the time when a complaint is filed. 491 F. Supp. at 1088-89. The court was in no way endorsing the right of parents to unilaterally create a new placement, other than the one naturally existing when a disagreement arises. The court emphasized that the preceding placement had terminated for reasons beyond the control of the school district or the parents.

The *Monahan* court found that plaintiffs were likely to prevail on their claim that the administrative hearing procedures mandated by the EAHCA were not available due to a conflict with state law. It is, therefore, the direct opposite of the present case where the Stemples in no way claim that procedures called for by the Act were not available to them.

The facts in this case are that the delay in utilizing procedures and the expenditure for tuition arose from Petitioners' own delay in seeking a hearing and not from the unavailability of proper procedures. As set forth above, Petitioners wanted to change the placement that had been decided upon and effected in January 1976. They chose to express their disagreement by unilaterally removing the child from the placement in May, 1976, rather than by seeking a hearing. When their request for tuition reimbursement was denied, they still did not seek a hearing on the issues for an additional year.

In *Stuart v. Nappi,* 443 F. Supp. 1235 (D. Conn. 1978), the public school sought to expel a handicapped high-school age child for disciplinary reasons. The parents of the child claimed that the school could not expel her without first affording procedures under the EAHCA, since she was handicapped, and the behavior problems leading to expulsion resulted from special education needs which were inadequately met by the school. Citing § 615(e)(3), the Court granted a preliminary injunction preventing the school from expelling the child during the proceedings. 443 F. Supp. at 1241. The court made it clear that a school cannot avoid its duty to maintain a handicapped child in his or her placement by characterizing the child's removal as a disciplinary measure.

Stuart v. Nappi shows clearly that a party will not be permitted to avoid the EAHCA procedures by unilaterally terminating the placement on some theory and then insisting that the new situation be the "current" one which must be recognized while proceedings under the Act take place.

Three other cases cited by Petitioners do not discuss § 615(e)(3) at all. In *Howard S. v. Friendship Independent School District,* 454 F. Supp. 634 (S.D. Texas 1978), the parents of a handicapped minor sought a preliminary

injunction under § 504 of the Rehabilitation Act, alleging that school authorities had not given him the due process procedures required by that statute. The court did not even find jurisdiction under the EAHCA. Rather, it held that plaintiffs had a private right of action under § 504 of the Rehabilitation Act of 1973 and granted their preliminary injunction because school authorities had failed to provide the handicapped child a proposed educational placement and had not allowed his parents to participate in the decision or invoke their due process hearing rights.

The plaintiffs in *Frankel v. Commissioner of Education,* 480 F. Supp. 1156 (S.D.N.Y. 1979), alleged that the Commissioner of Education of New York had failed to timely and properly classify the minor plaintiff as handicapped and provide him with an appropriate education. *Frankel* held that the EAHCA could be applied to claims which arose prior to its effective date but which were awaiting final agency action at that time. The legal question involved the consistency of New York State law with EAHCA requirements. Nowhere did that opinion discuss the statutory language of § 615(e)(3).

In *Capello v. D.C. Board of Education,* 3 EHLR 551:500 (D.D.C. Jan. 23, 1980), 3 EHLR 551:190 (D.D.C. May 9, 1979), appeal denied, No. 80-1217 (D.C. Cir. June 11, 1980), the parents of an emotionally disturbed boy removed him from a public-funded private school placement and placed him in another private, residential school after proceedings under the EAHCA had begun, rather than return him to a public school day placement as proposed by the public school system. After ruling on the merits that the private, not the public school, placement was appropriate, the court awarded tuition reimbursement retroactively for the period of the proceedings. Since this was done without comment, explanation, or mention of § 615(e)(3), it is difficult to view it as an endorsement of Petitioners' position. It would appear that the court simply failed to consider the effect of § 615(e)(3).

Petitioners also incorrectly state that the lower court's holding is "at odds" with policy developed by the federal Bureau of Education for the Handicapped ("BEH"). Petition at 36. The meaning of § 615(e)(3) is elucidated by policy letters of BEH attached to the Petition, and these letters support the interpretation of the Fourth Circuit. The text of the response dated March 14, 1979 to James T. Micklern states:

> You asked if a local school district is responsible for the cost of tuition, during a due process hearing on the appropriateness of that placement, when the parent has placed the child in a private school without prior agreement of the local school district. Parents may choose to send a child to a private school rather than take advantage of a free appropriate public education. If this happens, there is no requirement for the State or local education agency to bear the cost of the private school tuition. In this situation, the cost of tuition could not be considered the responsibility of the State or local educational agency under the provisions of the Part B regulations (121a.513) unless the public agency and the parents of the child agree. This agreement is unlikely in that the placement is the substance of the disagreement under consideration in the due process hearing. App. G at 45a.

That opinion letter goes on to respond that when a local school district has placed the child in a private school and a disagreement develops as to the continuation of the private placement, then the school district is under an obligation to continue the payment of tuition until the due process proceedings have been completed. In other words, the duty runs both ways. If a local school district has placed a child in a private school, that is the child's current educational placement, and the local school district cannot remove the child from such private school during the pendency of that proceeding. App. G at 45a-46a.

In another BEH policy letter, dated May 15, 1979, the following is concluded:

> 1. It is correct that under Section 121a.552 of the regulations, an LEA must annually determine a handicapped child's placement. However, this must be done through a reassessment of the child's Individualized Education Program (IEP) with the parents involved as required in Sections 121a.340-121a.349. A change in placement cannot be made unilaterally by the LEA.
>
> 2. If the parents and LEA cannot agree on the proper placement, the LEA may *propose* to change the existing placement, but not before it gives the parents the notice required under Sections 121a.504-121a.505.
>
> 3. The notice to the parents informs them of their procedural rights under the statute and regulations. The parents may initiate a hearing under Section 121a.506, and if they do not prevail at the hearing, may exercise their appeal rights under Section 121a.501-121a.511.
>
> 4. Section 121a.513 requires that the child's placement remain the same during these proceedings. Thus, the LEA does not have a right to arbitrarily change that placement without the parents' agreement. App. G at 47a (emphasis in original).

Again, BEH makes it clear that the duty to keep a child in his or her current educational placement begins as soon as school authorities make their decision as to the identification, evaluation and placement of that child.

The Stemples in this case seek to put the cart before the horse by treating the changed placement they desire as the current placement. All interpretations of the EAHCA support and uphold the orderly procedures which it provides to both parents and schools to deal with disagreements. These procedures are set at naught if either party can require a desired change to be treated as the current

situation, simply by proposing it and acting unilaterally to effectuate it.

III.

THE FOURTH CIRCUIT'S INTERPRETATION OF § 615(e)(3) GIVES EFFECT TO ITS PLAIN MEANING AND PROMOTES THE PURPOSES OF THE EAHCA.

A. *The Plain Meaning of the Statute*

As Petitioners recognize, the EAHCA sets forth procedural safeguards available to parents who wish to appeal the decision of an educational agency regarding the identification, evaluation or educational placement of their child. 20 U.S.C. § 1415(b)(1)(c). The statute requires an administrative hearing and an appeal for review by the state education agency, if the hearing is conducted by a local or intermediate educational unit. There must be an impartial decision maker, and the parties have the right to present oral and written evidence, confront and cross-examine witnesses, be represented by counsel, and have a written decision from the hearing officer. A party dissatisfied with the administrative decision may file an action in federal district court, where the court may hear additional evidence and is to reach a decision on the merits. 20 U.S.C. § 1415(b), (d), (e); 45 C.F.R. § 121a.509; Petition at 20-21.

While these review proceedings are being conducted, it is self-evident that an interim arrangement is needed for the child. Congress made a judgment that children should remain in their existing placement during this period, a decision which is embodied in § 615(e)(3). Petitioners are asking, in effect, that the Court rewrite the policy chosen by Congress without even alleging that Congress exceeded its power in making this choice.

The effect of § 615(e)(3) is succinctly expressed in *Monahan v. State of Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), a case cited by Petitioners. The Court stated:

> In essence, it [615(e)(3)] is like an automatic preliminary injunction which maintains the child's then current educational placement. However, unlike a preliminary injunction, the statute replaces "the Court's discretionary consideration of irreparable harm and likelihood of success on the merits with an absolute rule in favor of the status quo." . . . The court is therefore without the power to place a child in any provisional placement except for his then current educational placement. 491 F. Supp. at 1088 (citations omitted).

The Congressional mandate must be followed.

Petitioners do not directly dispute the Congressional choice. They concede that parents who remove children to a private school during the pendency of proceedings must pay the tuition. Petition at 24-25. Their contention is that they should be able to accomplish indirectly — by removing the child first and then bringing proceedings — what the statute prohibits them from doing directly. In essence, Petitioners are contending that parents may unilaterally create a different placement, and then say it is the "current" placement, which the educational authorities must finance during the proceedings. Such an interpretation would allow parents to sidestep the statute, and vitiate the effect of § 615(e)(3).

Justice Holmes once wrote, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 332, 339 (1929). The constant theme of the EAHCA is that basic decisions about the education of handicapped children should be made only after an opportunity for input by both the parents and the educational authorities. It contravenes this basic purpose to allow the Stemples to cast financial

burdens upon the educational authorities by first taking unilateral action and then invoking the hearing procedures. Given the statute as a whole, it is illogical to give the words the meaning for which Petitioners argue.

The natural meaning of "current placement" is the placement which has been in effect, not one which is unilaterally created in derogation of the statutory method for effectuating changes.

B. *Purpose and Intent of Statute.*

Finally, a large part of the Petitioners' argument is premised on a hypothetical posed by them, rather than the actual facts of the case. Petition at 39-48. On the basis of their hypothetical, Petitioners seek to raise the spectre of parents locked into a system from which they cannot escape and allude to schools rewarded for "intransigence" and unfairness to "poor parents."[11] Petition at 44, 48.

As stated above, this is not a case where the parents have alleged that the school failed to utilize proper procedures in deciding upon the child's placement. In a case such as the present one, where the only issue is disagreement about a properly-made placement, it is inappropriate to characterize one party's behavior as "intransigence". If disagreement is intransigence, then both parties are intransigent.

The contention that "[a]s soon as the public agency proposes some action with regard to identification, evaluation, or placement, the parents are locked into the school system and may not be able to escape for years," is

[11] Insofar as Petitioners create a hypothetical concerning "poor parents", they are addressing facts and issues which are not part of their case. Nowhere along the path of this appeal have the Stemples alleged that they are part of a poor class or that a decision adverse to them would affect poor people generally.

expressly contravened by the statutory provisions of the EAHCA and its regulations. Petition at 44; *see* 45 C.F.R. § 121a *et seq.*

The statute unequivocally provides that each educational placement is only for one school year. An educational agency which receives payments under the EAHCA must assure that it:

> will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually. . . . 20 U.S.C. § 1414(a)(5).

This duty on the part of the educational agency to review a child's educational placement once a year is repeated in the regulations at least twice. In the provisions dealing generally with placements, it is stated:

> Each public agency shall insure that:
>
> (a) Each handicapped child's educational placement:
>
> (1) Is determined at least annually. . . . 45 C.F.R. § 121a.552.

Again the regulations repeat:

> (d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year. 45 C.F.R. § 121a.343(d).

The comments accompanying this particular section of the regulations once more state: "The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP."[12] Thus,

[12] Maryland has even more stringent review requirements. The present State Board of Education Bylaw mandates that a

Petitioners' contentions that a child will be locked into an inappropriate placement for years on end while parents proceed through the administrative and judicial process has no basis in the law. Rather, the child's educational program will continue to be reviewed at least once a year and be responsive to the changes in both the child's educational needs and school programs. Indeed, the facts of the instant case concern just one school year (1976-77) as the Stemples and school authorities were able to reach agreement on a mutually satisfactory program which permitted Elaine to return to the public school system.

---

county's "Admission, Review, and Dismissal Committee" shall review the progress of every child receiving special education services within 60 days after the initial placement. Bylaw 13.04.01.06.D.5.

CONCLUSION

The core weakness of Petitioners' request for review is that they treat this controversy as a hypothetical case, rather than facing up to the facts as they actually exist.

The Fourth Circuit decision addresses only the specific instance where parents have removed their child from the public school before seeking to invoke the available administrative procedures. It considers the effect of their action only as to a limited result; namely, forfeiting a right to reimbursement.

Petitioners have not alleged that the January 1976 placement, which would have continued but for their unilateral action, was improperly decided upon. Therefore, this is not a case that presents the issue of the application of § 615(e)(3) when the existing placement is improperly decided upon or is impossible to maintain by the very nature of the circumstances. Other decisions on such points are not in conflict with this case and, in fact, manifest the ability of courts to fashion appropriate relief in a manner consistent with § 615(e)(3).

Neither is this a case where Petitioners allege any reason why they could not have initiated the proceedings called for by the EAHCA, rather than acting unilaterally. Their own recitation of facts shows that Respondents accorded them all local and state level hearings to which they were entitled. Therefore, the construction of § 615(e)(3) in this case in no way addresses the issue of parents who allege they were denied the hearing rights guaranteed by the Act before they removed their child from the school.

The only procedural issues raised by Petitioners in this case involve allocation of the burden of proof and presentation of evidence at the hearing stage. Since the Stemples first asked for a hearing after removing the child, these

allegations, even if true, could not justify their violation of the duty imposed by § 615(e)(3).

The Fourth Circuit's application of § 615(e)(3) to the facts of this case is consistent with its plain meaning and promotes the Congressional intention, manifested throughout the EAHCA, that disagreements be resolved through an orderly hearing process in which both parties participate, rather than by unilateral action of either parents or school authorities.

For all of the reasons stated above, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland
GEORGE S. NILSON,
Deputy Attorney General
Counsel of Record
ELLEN M. HELLER,
ANNE C. SIROTA,
Assistant Attorneys General
One South Calvert Building
Baltimore, Maryland 21202
(301) 659-4000
Attorneys for State Board
of Education of Maryland

PAUL M. NUSSBAUM,
Counsel of Record
RICHARD C. DANIELS,
3723 34th Street
Mt. Rainier, Md. 20822
Attorneys for Board of
Education of Prince
George's County